No. 74-54

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

v.

BRADA MILLER FREIGHT SYSTEMS, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Whether an indemnification agreement in a trip lease entered into between two carriers operating in interstate commerce whereby the lessor agrees to indemnify the lessee for losses caused through the operation of equipment is in violation of Interstate Commerce Commission Regulations CFR 49 § 1057 and is therefore contrary to public policy and not enforceable.

STATEMENT OF THE CASE

Respondent deems it necessary to correct certain inaccuracies and omissions in the Statement of the Case of petitioner.

The equipment in question was leased by Brada Miller Freight System, Inc. (Brada Miller) from May Mawby (A. 12) (Donovan affidavit Ex. 1-A and 1-B, A. 16). On or about January 19, 1968, the driver of the equipment, Howard Hardrick, reported to Brada Miller that the equipment needed repairs and would be out of service for several days. Hardrick thereupon furnished Brada Miller with Drivers' Daily Logs for January 19, 20 and 21, 1968, showing the equipment "out of service." (A. 13) (Donovan affidavit Ex. 2-A, 2-B and 2-C, A. 16).

On or about January 18, 1968, Hardrick made application to Transamerican Freight Lines, Inc. (Transamerican) as a driver and an inquiry concerning Hardrick was sent from Transamerican to Brada Miller (A. 88) (Temperly deposition Ex. 15, A. 90). Hardrick furnished Transamerican with a Statement in Lieu of Logs dated January 19, 1968 which showed that Hardrick had not worked for the previous seven days (A. 69) (Temperly deposition Ex. 3, A. 90) and signed a Lease Agreement, purportedly on behalf of Brada Miller (A. 60, 61) (Temperly deposition Ex. 1, A. 90). Hardrick then proceeded to transport a load of steel to Kansas City for Transamerican during which trip a collision occurred near Smithboro, Illinois. Upon arriving in Kansas City, Hardrick furnished Transamerican with Drivers' Daily Logs for January 19, 20, 21, 22, 23 and 24, 1968. (A. 70, 71) (Temperly deposition Ex. 4, 5, 6 and 7, A. 90). Hardrick reported the accident to Transamerican and Transamerican filed a written report on I.C.C. Form M.C.S. 501955 dated 5/17/68. (A. 74, 75) (Temperly deposition Ex. 9, A. 90). Hardrick did not report the accident to Brada Miller and Brada Miller first received knowledge of the accident about May 6, 1968 (A. 15).

It was Transamerican's practice to enter into trip leases directly with the drivers of the equipment (A. 44). Sometimes a driver would just show up at the door (A. 50). Often a driver would call and the dealings would be directly with the driver (A. 51). The driver was required to produce a chauffeur's license, a physical report, drivers' logs and registration papers for the equipment. (A. 45, 46). Transamerican did not require the driver to furnish any written authority from the owner or the lessor of the equipment; Transamerican entered into the trip lease on the basis of the word of the driver and the necessary documents. (A. 46). The instructions to Brada Miller's drivers were that trip leases could be entered into only on written authorization of Brada Miller's terminal manager (A. 29, 33). Hardrick did not have such authority to enter into a trip lease with Transamerican (A. 13, 32).

SUMMARY OF ARGUMENT

Indemnity agreements in equipment leases between carriers in interstate commerce tend to frustrate the provisions of the Interstate Commerce Commission regulations 49 CFR § 1057 which require that exclusive possession, control and use of the equipment and responsibility therefor reside in the lessee.

The case of *Alford v. Major*, 470 F.2d 132 (7th Circ. 1972), held that such indemnity agreements were contrary to public policy and were not enforceable. The statements in other cases which have dealt with this problem to the effect that the lessor in *Alford* retained control of the driver and equipment are not correct. The suggestions in *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Circ. 1972), *Carolina Freight Carriers Corp. v. Pitt County Transp. Co.*, 492 F.2d 243 (4th Circ. 1973), and *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100 (6th Circ. 1974), that

indemnity agreements are valid unless there is some violation of I.C.C. regulations would only tend to increase violations. In such cases a lessor could avoid responsibility under an indemnity agreement by exercising control contrary to the regulations.

Indemnity agreements in equipment leases have had the effect of transforming simple lease agreements into agreements designed to shift ultimate responsibility from the lessee to the lessor. As a result leases contain conflicting provisions, some of which recite that the lessee has full responsibility for and control of the driver and equipment while other provisions, contrary to I.C.C. regulations, shift control to the lessor.

Trip leasing by its very nature gives rise to uncertainties regarding the authority of drivers to enter into trip lease arrangements. In the present case there is evidence that the driver was in fact attempting to practice a fraud on the proposed lessor. As a result disputes arise between lessee and lessor which do not serve the public interest and which tend to inhibit investigation and settlement of claims and increase litigation.

In their Amici Curiae brief, the United States and the Interstate Commerce Commission take the position that agreements whereby the lessor agrees to indemnify the lessee have the effect of placing responsibility where it blongs. However, under the common law doctrine of respondeat superior, under the I.C.C. regulations and in fact, liability rests with the lessee. The negligence of the driver is the negligence of the lessee and not of the lessor. Indemnity agreements thus have the effect of shifting liability from the negligent party to the non-negligent party, the very result which the United States and the Interstate Commerce Commission wish to avoid. The solution is to permit the law to place ultimate responsibility without regard to indemnity agreements. Thus each party will ultimately be liable for its own negligence and liability shifting will be avoided.

ARGUMENT

The question before this Court has been decided differently by various United States Courts of Appeals, United States District Courts and State Courts. There is a clear split of authority. The issue is whether an indemnity agreement in a trip lease entered into between two interstate carriers, violates the regulations of the Interstate Commerce Commission (I.C.C.), 49 CFR § 1057, and is therefore contrary to public policy and is unenforceable.

At the outset, respondent would remind the Court that there are in this case unresolved factual issues to be decided at the trial level in the event this Court should reverse. Although determination of these factual issues is not necessary to enable this Court to reach a decision, they are important as hopefully will be made apparent. Relying on the provisions of the trip lease in question and the factual situation surrounding its coming into being, respondent intends to show by a process of induction that indemnity agreements between interstate carriers are contrary to the letter and the spirit of the I.C.C. regulations.

Although this Court might hold that all indemnity agreements in trip leases are not by their nature in violation of I.C.C. regulations and not unenforceable per se, it does not follow that all indemnity agreements are automatically enforceable at the instance of the indemnitee. The various lower courts which have construed the indemnity agreements have had the advantage of dealing only with one lease at a time, while this Court is called upon to pass on all indemnity agreements without regard to their separate differing provisions. Should this Court condemn all indemnity agreements, then the courts will be shed of this problem once and for all. The question for this Court is whether by their very nature they tend to frustrate the purpose of the I.C.C. regulations or have other effects not con-

sistent with the common good. If so, they should be unenforceable; if not, each indemnity agreement must hereafter stand or fall on its own.

Distinction Between Alford v. Major and Subsequent Cases Is Not Valid.

The cases chiefly relied on by respondent are: *Alford v. Major*, 470 F.2d 132 (7th Circ. 1972), affirming 314 F. Supp. 979 (N.D. Ind. 1970); *Denver Midwest Freight Lines v. Busboom Truck*, 207 N.W.2d 368 (Neb. Sup. Ct. 1973), and *Gordon Leasing Co. v. Navajo Freight Lines*, 326 A.2d 114 (N.J. Dist. Ct. 1974).

Other cases, cited by petitioner, have reached contrary conclusions. Some of these cases seek to distinguish *Alford* on the grounds that the indemnification agreement in *Alford* permitted the lessor to maintain full control over the truck and the driver. *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F.2d 710, 714 (5th Circ. 1972); *Carolina Freight Carriers Corp. v. Pitt County Transp. Co.*, 492 F.2d 243, 246 (4th Circ. 1973); *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100, 102 (6th Circ. 1974). In its *Argument* (Brief p. 12) petitioner adopts the same position.

For example, the court in *Jones Truck Lines* states, 102, "This is true for the obvious reason that in Alford v. Major, supra, the indemnification agreement itself permitted the lessor to retain full control over the truck and driver . . ." Contrary to the language in the cases cited by petitioner, the court in *Alford v. Major* did not find that the lessor exercised control over the driver or that the indemnification agreement permitted the lessor to do so. In *Alford*, lessee took the position that since the driver was in the regular employ of the

lessor, then the actual care, custody and control of the truck remained with the lessor, *through its driver*. The lessee argued that the regulations implicitly acknowledged this practical fact and that since the sole purpose of the regulations was to provide the injured members of the public with a financially responsible defendant, there should be no public policy objection to the indemnity agreement. There is nothing in *Alford* to indicate that the lessee or lessor actually violated any I.C.C. regulations. In *Alford* the lessee *argued* that the actual care, custody and control remained with the lessor through the lessor's driver. In the present case Transamerican *argues* that it had control of the truck which was being operated by Hardrick. The facts are the same. The lessee in *Alford* interpreted these facts as leaving control in the lessor; Transamerican interprets them as placing control with the lessee.

Transamerican made a similar argument in this case to the Court of Appeals, the same Court which decided *Alford*. *Sandra Wear v. Brada Miller Freight Systems, Inc.* (7th Circ. 1974), not reported. (Appendix B, A-6, Petition for Writ of Certiorari.) In rejecting the distinction between *Alford* and *Alterman*, the Court said (Petition for a Writ of Certiorari, A-12):

> "We do not agree that Alford can be distinguished from *Alterman*.[5]
>
> [5] Transamerican contends that in *Alford* the parties agreed to place full control in the lessor; apparently, the *Alterman* court assumed this as well. All that is clear from the *Alford* opinions is that the lessee *argued* that controls remained in the lessor. In any event, our disposition makes this aspect irrelevant."

Despite the misinterpretation given *Alford* by *Alterman et al.*, it is clear that the court in *Alford* did not base its decision on any illegal retention of control by the lessor or any specific violation of I.C.C. regulations. The court in *Alford*

held that indemnity agreements by their very nature conflict with the requirement of control by the lessee.

> l.c. 135 "Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we find that the indemnification clause is unenforceable."

An indemnity agreement running from a lessor to a lessee would as a practical matter weaken the already tenuous bond existing between the lessee and the driver. The driver is in the regular employ of the lessor, his contacts with the lessee are minimal, he is operating his own or the lessor's equipment, after one trip he will be back at his regular job, etc. It is difficult enough for the lessee to exercise tight control over the driver under such conditions. Add to this the fact that the lessee knows that in the event of a casualty he will be protected by an indemnity agreement. Without actually violating any specific I.C.C. regulation the lessee under such circumstances does not have the incentive to exercise the strict control necessary to assure protection to the public. As stated in *Alford* (135) "while it is true that one of the objectives of these regulations was to furnish financially responsible defendants to injured members of the public, this was certainly not the exclusive purpose of the regulatory scheme. *Indeed, highway safety must be considered to have been one of the paramount goals*" (emphasis supplied). A lessee who knows that in the long run he will be required to bear the financial responsibility for injury caused by a negligent driver will not only exercise more care in accepting that driver but will see to it that the driver takes every precaution for the safety of the operation. The best way to assure that the lessee will exercise exclusive possession, control and use of the equipment as required by the regulations is to give him an economic incentive to do so.

Validity of Indemnity Agreements Cannot Be Made to Depend on Whether Regulations Were Violated.

The suggestions in *Allstate*, supra, 714, *Carolina Freight Carriers*, supra, 246, and *Jones Truck Lines*, supra, 102, that the indemnity agreements should be given effect unless there is some violation of I.C.C. regulations is entirely unworkable. In the first place, the determination of whether a violation existed could be made only by a court, thus increasing the litigation already existing in this area. Of greater concern is the likelihood that such a rule would have the tendency to encourage violations of I.C.C. regulations. In order to avoid liability under the indemnity agreement, a lessor need only claim that it did in fact exercise control over the driver and the equipment. Thus the very act of violating the regulations would release the lessor from responsibility under the indemnity agreement. The alternative to such a rule would be to enforce all indemnity agreements despite violations of the regulations. This would have the equally absurd result of enabling the lessee to violate the regulations with impunity and with the assurance that the lessor must eventually reimburse him for any loss. More than anything this points up the folly of attempting to separate the obligation of control from the ultimate financial obligation. The duties of a lessee under a trip lease agreement may be rather onerous. But the public good requires that they be carried out in strict compliance with the law. The knowledge that someone else eventually will bear the cost of failure will have the effect of making failure more likely.

Transamerican's Lease Agreement Violates the Requirements of the I.C.C. Regulations.

I.C.C. regulations only require that trip leases contain a few specific agreements including a provision that the lessee exercise full responsibility and control. The addition of an indem-

nity agreement adds a foreign element to the trip lease. Instead of the simple lease contract contemplated by the regulations, the trip lease has become a vehicle to shift the ultimate responsibility from the lessee to the lessor. An analysis of the Lease Agreement (Appendix to petitioner's brief) discloses that most of its provisions appear to support and bolster the indemnity agreement. The agreement to lease equipment seems to be much less important than the indemnity clause and its supporting clauses. Since the Lease Agreement was prepared by or for Transamerican, it is only natural that the drafter would use great care to see that the indemnity provision is as favorable to Transamerican as possible. Of necessity, however, the drafter is faced with the difficulty of reconciling conflicting ends: he must leave control in the lessee but place ultimate responsibility on the lessor. As a result, the various provisions of the Lease Agreement are in hopeless conflict and taken as a whole the Lease Agreement violates both the letter and the spirit of the regulations.

Transamerican in its brief (P. 11) refers to Paragraph 4 of the Lease Agreement to show that it exercised the necessary control:

> It is mutually understood and agreed, that the First Party (Transamerican) during the term of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.

Transamerican states that it did in fact exercise control (Brief p. 11). That is not really the issue, however, as the question before this Court involves the validity or invalidity of the indemnity agreement. A contract which is contrary to public policy is void even though in the particular circumstances no

injury resulted to the public. The test to be applied is not what was actually done but what might have been done under the terms of the contract. 17 *CJS, Contracts*, § 211, *Weil v. Neary*, 278 U.S. 160, 49 S.Ct. 144, 73 L.Ed. 243 (1929). The rights and obligations of the parties to this contract cannot be discovered merely from a reading of paragraph 4. It is necessary to examine the Lease Agreement as a whole to find out what these rights and obligations are and thus to determine if the contract violates the I.C.C. regulations.

The whole purpose behind trip leasing is to enable a certified carrier to augment its equipment by leasing from other certified carriers or from owners of the equipment. Originally, equipment leasing resulted in a practice where authorized carriers used non-owned equipment under oral agreements which often created difficulties in fixing the lessees' responsibility for accidents. The leasing carriers often failed to inspect the equipment used or to supervise the operation of the vehicles. In answer to the difficulties thus created, the I.C.C. held hearings and established regulations which were upheld in the Supreme Court's opinion in *American Trucking Association v. United States*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1952). The purpose of the regulations was "to protect the industry from practices detrimental to the maintenance of sound transportation services . . ." and to assure safety of operation for vehicles and drivers. *American Trucking Association v. United States*, supra, 310. The regulations and the cases construing the regulations leave no doubt that the lessee carrier is to be the carrier in fact. Strongly disapproved are arrangements whereby carriers engage in joint ventures where one carrier furnishes the equipment and the other furnishes the license. *Carriers Insurance Exchange v. Truck Insurance Exchange*, 310 F.2d 653 (4th Circ. 1962). The actual, physical transportation of goods must be done by the lessee carrier and under its complete direction, responsibility and control.

Turning to the Lease Agreement under which Transamerican bases its claim for indemnity against Brada Miller (appendix to Petitioner's Brief A-1, A-2) it is agreed:

> 1. "The Second Party (Brada Miller) hereby leases to the First Party (Transamerican) the following motor vehicle equipment . . . for the movement in interstate commerce for the duration of one (1) single trip . . . of such freight which First Party shall turn over to Second Party and the Second Party agrees to transport such freight . . ."

This provision is clearly contrary to the regulations and to the cases construing the regulations. The Lease Agreement specifically provides that Transamerican shall turn the freight over to Brada Miller and that Brada Miller "agrees to transport such freight", whereas the duty to transport the freight belonged to Transamerican.

Furthermore (Appendix to Petitioner's Brief A-2):

> 3. "Second Party further agrees that it will bear the entire cost of operating said motor vehicle equipment, and that it will at all times keep said motor vehicle equipment in good mechanical condition, order and repair, and will cause said motor vehicle equipment to be operated only by a competent employee of the Second Party . . ."

These responsibilities cannot be separated from control. Yet the lessee carrier under the regulations is supposed to be in complete control "from the time the equipment passes the inspection required to be made by lessee" 49 CFR § 1057.3(a). A requirement that the lessor will "keep said motor vehicle equipment in good mechanical condition, order and repair" is not consistent with control in the lessee and places a duty on the lessor that the regulations place squarely on the lessee. The requirement

that Brada Miller "cause said motor vehicle equipment to be operated by a competent employee of the Second Party" has the effect of allowing control over the operation of the vehicle to remain with Brada Miller.

Paragraph 5 of the Lease Agreement (Appendix to Petitioner's Brief A-2, A-3) places even more responsibility on the lessor:

> 5. "Second Party further agrees that in the operation of said motor vehicle equipment it will comply with all the rules and regulations of the Bureau of Motor Carriers of the Interstate Commerce Commission, and the applicable rules and regulations of any public utility commission and of any other similar state authority: that it will observe all pertinent rules and regulations governing the hours of service of its drivers of (sic) helpers, and all regulations, laws and ordinances of any government authority applying to the operation upon the public highways of said motor vehicle equipment . . ."

Again, this provision assumes that the vehicle will be operated by Brada Miller. The rules and regulations involved might include weight and size limitations, speed limits, tire pressure requirements, braking regulations, headlight and taillight requirements, use of certain roads and other requirements of federal, state and local authorities. Compliance with such rules and regulations presupposes the right and duty of the lessor to control the operation of the vehicle. The requirement that the lessor "observe all pertinent rules and regulations governing hours of service of its drivers" assumes a close exercise of control over the physical person of the driver.

The cases relied on by Transamerican: *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, supra, *Allstate Insurance Company v. Alterman Transport Lines, Inc.*,

supra and *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, supra, all sought to distinguish *Alford v. Major*, supra, on the ground that in *Alford*, the lessor in fact retained control over the truck and the driver. As pointed out above this distinction is probably not valid. But it raises a most interesting point. Here we are concerned with the validity of a contract rather than what was in fact done in one particular instance. If the courts in *Carolina Freight Carriers, Allstate Insurance* and *Jones Truck Lines* had been construing the Lease Agreement in question would they not have found that the agreement by its very terms provided that Brada Miller "agrees to transport such freight" and that Brada Miller was required to exercise tight control over the vehicle and its driver? No other finding is possible under the terms of the lease. And having thus found, the statements in *Carolina Freight Carriers, et al.*, would have left the courts no other choice but to declare the indemnity agreement invalid.

The decisions construing the regulations make it clear that under a trip lease agreement, the driver becomes the agent and employee of the lessee. Here the driver at the time of the accident was employed by Transamerican. In *Simmons v. King*, 478 F.2d 857, 867 (5th Circ. 1973), there was raised the question of the status of the driver King with relation to the lessee:

> l.c. 867. Here the lease specifically stated that Dubose as lessee assumed "full responsibility . . . to the public" as required by § 1057.4. Requisite placards and an inspection were also provided by Dubose as required by § 1057.4. The deliberate fulfillment of these statutory prerequisites by the parties must be viewed as giving rise to a statutory relationship, since these regulations have the force and effect of law, Cox v. Bond, supra, 249 A2d at 586. Since under the lease Dubose assumed exclusive possession, control and use of the vehicle and responsibility to the public then King became his statutory employee, and as such

> Dubose was vicariously liable as a matter of law for the negligence of King.

See: *Cox v. Bond*, 249 A.2d 579 (Sup. Ct. N. J.); *Cosmopolitan Mutual Insurance Company v. White*, 336 F.Supp. 92 (D.C. Del. 1972) and *Proctor v. Colonial Refrigeration Transportation, Inc.*, 494 F2d 89 (4th Circ. 1974). In *Branneker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524, the Supreme Court of Missouri in considering the same problem wrote:

> l.c. 533 "The essential element in determining whether the driver of a motor vehicle is the agent or servant of the owner at the time of the wrongful act is the owner's right to control and direct the driver's conduct . . . A man cannot serve two masters at the same time, and although there may be a joint employment and also acts for which more than one employer may be liable, nevertheless there is no several liability of two persons, not acting jointly, as separate masters of a single servant for the same act."

Barsh Truck Lines, Inc. v. Jerry Lipps, Inc., 424 S.W.2d 81 (Mo. App. 1968).

The Lease Agreement Paragraph 3. provides, however, that the driver remains the employee of Brada Miller. (Appendix to Petitioner's Brief A-2)

> 3. "Second Party . . . will cause said motor vehicle equipment to be operated only by a competent employee of the Second Party, in which event said employee of the Second Party shall be the representative of the Second Party in the premises. It is being expressly understood and agreed that nothing herein is to be construed as constituting Second Party, its agents, servants and employees, as the agent, servant, employee or representative of the First Party."

These provisions of the trip lease are in direct conflict with the regulations and the cases. Transamerican denies that the driver

is its "agent, servant, employee or representative" whereas the law decrees nothing less. If the driver is not even Transamerican's "representative", then how does Transamerican maintain the "exclusive possession, control and use of the equipment" required by the regulation? It is not enough for Transamerican to admit responsibility to the public for the regulations require responsibility *and* control.

The indemnity provision of the Lease Agreement provides:

> 9. It is mutually understood and agreed by and between the parties hereto that First Party shall not be responsible to Second Party, its agents, servants and employees, for any negligence of the Second Party, its agents, servants or employees, or for any loss, damage, injury or expense arising out of the failure of Second Party to carry out the terms of this Agreement. Second Party hereby agrees to indemnify and save harmless First Party from any and all claims, suits, losses, fines or other expenses arising out of, based upon or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of Second Party, its agents, servants or employees, and for any loss or damage to cargo resulting form [*sic*] any negligence or unlawful act of Second Party, his agents, servants and employees. It is mutually understood and agreed that Second Party will defend, at his own expense and cost, any and all suits that may be brought against First Party for injuries sustained, including death resulting therefrom, or damage to property caused or alleged to have been caused by the negligence of any person employed by Second Party, while engaged in the performance of any of the work required by the terms and conditions of this Agreement, and for any cargo loss sustained resulting from any negligence or unlawful act on the part of Second Party, his agents, servants and employees. Nothing in this Paragraph 9 contained shall be construed to in anywise limit the liability of the Party of the First Part to the public in connection with the use of said equipment under this Agreement.

This paragraph provides indemnity to Transamerican for losses resulting from the negligence of Brada Miller's "agents, servants or employees". This is the heart of Transamerican's claim against Brada Miller. In its Amended Crossclaim (A. 6) in paragraph 5, Transamerican alleges that "The motor vehicle referred to in plaintiff's petition . . . was being driven and operated by an agent, servant and employee of defendant Brada Miller Freight System, Inc." The person referred to was the driver, Hardrick. At the time of the accident out of which the lawsuit arose Hardrick was operating the equipment either on behalf of Transamerican or on behalf of Brada Miller. If the operation was on behalf of Transamerican, then the indemnity agreement by its terms cannot apply to Brada Miller as Hardrick was not then the "agent, servant and employee" of Brada Miller. *Branneker v. Transamerican Freight Lines, Inc.*, supra. If the operation was on behalf of Brada Miller then the Lease Agreement was a subterfuge and was in violation of the I.C.C. regulations. *Carolina Freight Carriers Corp. v. Pitt County Transportation Co.*, supra, *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, supra, *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, supra. There can be no doubt that under the I.C.C. regulations and in fact, Hardrick was operating the equipment for Transamerican and not for Brada Miller and Hardrick was Transamerican's "agent, servant and employee" at the time of the casualty.

The Lease Agreement under which Transamerican seeks to recover from Brada Miller violates the I.C.C. regulations. It was drafted in an attempt to place full responsibility and control on Brada Miller. Paragraph 4, which recites that control and responsibility for the operation of the equipment

shall be with Transamerican, is simply cant and is contrary to the language and intent of the rest of the agreement. This more than anything illustrates why indemnity agreements in trip leases are not compatible with the I.C.C. mandate.

Naturally, there is pressure on the drafter to make the terms of the contract as favorable to his interests as possible. Since interpretations vary, care must be taken to conform to the laws of various jurisdictions. For example, the courts of Missouri and indeed of most jurisdictions will not construe an indemnity contract to indemnify one against his own negligence unless such intent is clearly expressed. *Monsanto Company v. Port of St. Louis Investments, Inc.*, 350 F.Supp. 502 (E.D. Mo.). This limitation might be obviated by reciting in the contract that the driver is under the control of and is the employee of the lessor. Then the lessor would be liable for the driver's negligence. Obviously, that is what was done in Transamerican's Lease Agreement. The contract is loaded with provisions that have little to do with the leasing of equipment in compliance with I.C.C. regulations. Most of the provisions are concerned with placing control and responsibility on Brada Miller. Thus the leasing provisions of the agreement become lost in those provisions which will enable Transamerican to shift liability to Brada Miller; the tail in truth wags the dog.

Uncertainties of Trip Leasing Give Rise to Delay and Litigation.

Although there are factual disputes in this case which can only be resolved at the trial level, respondent believes it is important that this Court be familiar with the nature of these disputes. In determining whether indemnity agreements in trip leases are contrary to public policy it is not sufficient for the Court to examine the agreements in a vacuum. Re-

spondent believes that it is important for the Court to understand the circumstances in which these agreements come to life and what effect these circumstances might have, good or bad, on the purposes of the I.C.C. regulations. Trucking operations in interstate commerce involve large numbers of units of equipment, both power units and trailers. Many if not most of the power units are actually owned by fleet brokers or individuals and are leased by I.C.C. carriers. For example, Brada Miller had under lease approximately seven hundred power units (A. 20) All power units in the Transamerican Steel Division were under lease (A. 43). In addition the carriers augment their equipment by trip leasing and engage in the practice of interchange of equipment, both of which practices are regulated by 49 CFR § 1057. By its very nature the interstate trucking business involves situations where temporarily unoccupied drivers and idle equipment seek out employment. "Hustling" loads is not an unknown practice in the industry. *Cosmopolitan Mutual Insurance Company v. White*, supra; *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3rd Circ. 1961). Ronald Temperly in his deposition testified that Transamerican's practice was to enter into trip leases directly with the drivers of the equipment (A. 44, 50, 51). Although the driver was required to produce certain documents, these did not include written authorization from the owner of the equipment. Transamerican was content to take the word of the driver that he in fact had the necessary authority to sign the trip lease (A. 46).

Whether or not Hardrick did in fact have authority to bind Brada Miller is not an issue for decision by this Court. But there is substantial evidence that Hardrick in driving for Transamerican was attempting to practice a fraud on Brada Miller. Since the equipment was under lease to Brada Miller, Hardwick had the duty to drive it in Brada Miller's service. Instead, Hardrick advised Brada Miller that the equipment was in need of

repairs and furnished Brada Miller with driver's logs showing that the equipment was "out of service" (A. 13, Ex. 2-A, 2-B and 2-C, A. 16). Thereafter Hardrick appeared at Transamerican, made application for employment as a driver (A. 89, Ex. 15, A. 90), furnished Transamerican with a Statement in Lieu of Logs (A. 69, Ex. 3, A. 90), assumed to sign a Lease Agreement on behalf of Brada Miller (A. 60, 61, Ex. 1, A. 90) and undertook to deliver a load of steel for Transamerican. On completion of the trip Hardrick furnished Transamerican with driver's logs for some of the same dates the logs furnished Brada Miller showed "out of service" (A. 70, 71, Ex. 4, 5, 6 and 7, A. 90). These facts clearly illustrate the uncertainty that of necessity surrounds the making of trip leases in interstate carrier operations. Practices become difficult to control and a lessee can never be certain that the driver who seeks employment is in fact authorized to bind the proposed lessor. The case of *Chicago RI & PR Co. v. Chicago B & Q R Co.*, 437 F.2d 6 (7th Circ. 1971) cited by petitioner presents an entirely different situation. There was involved two railroads which were signatories to the Standard Form Detour Agreement, an agreement adopted by the predecessor of the Association of American Railroads in 1905. Trip leases on the other hand are not standard form agreements. There are probably as many trip lease contract forms as there are carriers using them, each of course carefully written to the drafter's best advantage. In addition, railroad trains are not leased from one road to the other under circumstances which leave in doubt the authority of the driver (or engineer) to bind the lessor. The institution of trip leasing presents special problems calling for special solutions. These solutions do not include indemnity agreements between carriers.

Because of the uncertainties surrounding the making of trip leases it becomes difficult to define the areas of responsibility between the lessor and the lessee. Factual disputes are not unusual and opinions will differ concerning the legal rights and obligations of the parties. A lessor who is called upon to pay

because of an accident caused by a driver under the lessee's control is naturally reluctant to do so. Questions are raised concerning the authority of the driver to bind the lessor or concerning the employment of the driver at the time of the casualty. Attorneys dispute the effect of the differing and sometimes conflicting provisions of the lease and disagree on the interpretation of indemnity agreements. Insurance companies which have an interest seek to be heard and exercise influence. These conflicts result in delays which are not in the public interest. They have an inhibiting effect on the investigation and disposition of claims as well as tending to increase litigation.

Responsibility to the public requires prompt investigation and settlement of meritorious claims. However, if the lessee expects to be indemnified by the lessor there is less pressure on the lessee to investigate the accident and bring the matter to a conclusion. The fact that Transamerican did not file a report of the accident to the I.C.C. for almost four months would indicate it took this responsibility rather lightly (Ex. 9, A. 90). Brada Miller had no knowledge of the accident until May 6 and of course could make no investigation of the facts before that date (A. 15). Even though a lessee may acknowledge its responsibilities to the public, the belief that ultimately the lessor will pay removes some of the urgency to dispose of claims. This points up the difference between indemnity arrangements and insurance. The insurance company has a complete identity of interest with its insured. It is the insurance company's responsibility and it is in its best interests to investigate and pay claims. The indemnitor-indemnitee relationship is different. Each may look to the other to assume the work of investigation and to pay the claims. The ultimate responsibility can be decided later. Often indemnitors are joined as third party defendants and the plaintiff's lawsuit must provide a forum to determine the competing interests of the indemnitor and indemnitee.

The great amount of litigation over indemnity agreements in trip leases can be halted if the agreements are held to be contrary to public policy. Otherwise the various indemnity clauses will continue to be objects of litigation and the courts will be called upon to construe them one by one. This does not serve the public interest. The attempts to shift responsibility between trucking firms are costly, time consuming and place an entirely unnecessary burden on the courts. The I.C.C. regulations have placed responsibility on the lessee and the frustration of this policy by indemnity provisions should be terminated.

The Supreme Court of Nebraska in *Denver Midwest Motor Freight v. Busboom Truck, Inc.*, 207 N.W.2d 368, had occasion to confront this issue and recognized the split of authority between *Alford v. Major*,supra and *Allstate Insurance Co. v. Alterman Transport Lines, Inc.*, supra. In following the Seventh Circuit's decision in Alford the court said:

> L.C. 371 The approval of indemnity provisions under the circumstances here might well adversely affect the safety of operation of vehicles and drivers as suggested in Alford. It would also inject into trip lease negotiations an added element of uncertainty and permit carriers to circumvent the clearly spelled out requirements that a lessee exert actual control over leased equipment and borrowed drivers. Varying conditions and provisions of indemnity clauses when applied to varying factual situations introduce added elements of uncertainty and tend to blur lines of responsibility to the public between lessor and lessee and increase the prospect of litigation between carriers or their insurers without any corresponding benefit to the public. Insurance coverage of carriers might be adversely affected where tort liability of others is assumed by contract if such indemnification clauses were enforceable. If indemnity clauses in these circumstances are unenforceable, uncertainty is removed, statutory and regulatory provisions

> are fully enforced, and public policy is best served. We therefore hold that an indemnification clause in a trip lease of operating equipment by a licensed motor carrier, subject to ICC regulations, which obligates the lessor to reimburse the lessee for any payment made on account of any accident, claim, or suit arising out of the operation of the equipment during the term of the lease is unenforceable as against public policy. Such a clause would permit the lessee to circumvent the requirements of the Interstate Commerce Commission that unauthorized carrier lessees to exert actual control over the leased equipment and the borrowed drivers. Alford v. Major, 470 F.2d 132 (7th Cir.).

The judgment of the District Court was correct and is affirmed.

Respondent submits that the Nebraska Court's concern is justified by the present case.

The Effect of Indemnity Agreements Is to Shift Liability From the Lessee Who Has Control to the Lessor Who Does Not, Contrary to the Position of the United States and the Interstate Commerce Commission.

Respondent respectfully submits that the position of the United States and of the Interstate Commerce Commission as set out in their Amici Curiae brief is bottomed on a false premise: that the lessor retains physical moment to moment control over the leased vehicle and performs the "ministerial" task of moving the freight (Brief, pp. 7, 8, 9, 16). This position assumes that absent the I.C.C. regulations liability to the public would rest solely with the lessor and that it is only by reason of the "responsibility and control" regulations that the lessee has any liability. According to the Amici Curiae brief

the only requirement is that the lessor not retain control over the route and destination of the freight and that the operation be conducted under the lessee's name (Brief p. 16); otherwise the lessor has full control.

Under the doctrine of respondeat superior, the lessee would normally be liable for damages caused by the negligence of the driver. The regulations reinforce this responsibility. In none of the cases upholding the indemnity clauses, has there been any suggestion that the driver remained under the control of the lessor. The driver in fact became the agent and employee of the lessee for the purpose of making the trip under consideration. In *Allstate v. Alterman, supra* (714-715) it was held that Stewart, the driver, was under the actual control of the lessee. In *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, supra, the court found that the driver was the lessee's agent. The court in *Jones* held that the indemnity agreement did in fact relieve the lessee of its own negligence. Indeed, all of the cases assume that the purpose of the indemnity agreement is to require the lessor to reimburse the lessee for the lessee's own negligence.

In this case and in all of the cases dealing with this problem, the negligent actor was the driver. The lessor and lessee are liable if at all under the doctrine of respondeat superior or by reason of the I.C.C. regulations. The regulations place control and responsibility in the lessee. The common law through respondeat superior also places responsibility on the lessee rather than on the lessor. In *Carolina Casualty Insurance Company v. Transport Indemnity Company*, 488 F.2d 790, 794 (10th Circ. 1973), cited in the Amici Curiae brief, the court held that the driver was a special employee of the lessee and liability of the lessee was vicarious, i.e., by reason of the negligence of the driver. Similarly, in *Pacific National Insurance Company v. Transport Insurance Company*, 341 F.2d 514, 518 (8th Circ. 1965), it was held that the driver

was the agent of the lessee and *because of this relationship* the law imposed liability on the lessee. Under a trip lease, the law does not allow control to remain in the lessor as suggested in the Amici Curiae brief. The negligence of the driver is not through legal fiction the negligence of the lessor but rather that of the lessee. Of course, the lessor may be negligent if it furnishes defective equipment or an accident-prone driver, but it is not vicariously liable for negligent acts of the driver. Once the driver consents to drive for the lessee and actually enters into that employment and assuming the power of the lessee to control the details of the work, then the lessee and not the lessor is responsible for the driver's negligence. *Barsh Truck Lines, Inc. v. Jerry Lipps, Inc.*, supra (83). *Branneker v. Transportation Freight Lines Inc.*, supra (53). Indeed, the realities are that the lessee maintains actual control. The lessee tells the driver where to go and what route to follow (A. 83-84). He gives the driver expense money (A. 82). There can be no doubt that the lessee has the right and duty to control the details of the work. On completion of the trip the driver furnishes the lessee with driver's logs (A. 70). The driver reports accidents directly to the lessee (A. 73). The only way the lessor could maintain control is through general employment of the driver, but as shown when the driver enters into the special employment of the lessee, the lessee becomes responsible for his negligence. The I.C.C. regulations reinforce the common law in this respect, the cases holding that the driver becomes the "statutory employee" of the lessee. *Simmons v. King*, supra; *Cox v. Bond*, supra.

The position taken by the United States and the Interstate Commerce Commission in the Amici Curiae brief that the lessee maintains physical control of the vehicle and driver and performs the "ministerial" task of moving freight has no foundation in law or in fact. It has support neither in the common law doctrine of respondeat superior nor in the regulations and we doubt seriously that petitioner would be willing to adopt

this position. The purpose of the indemnity agreements is not to place the ultimate responsibility where it rightfully belongs as suggested in the Amici Curiae brief, but rather to shift the liability from the lessee who has control in fact and in law to the lessor who has not. It has no other purpose, for if the law placed ultimate responsibility on the lessor, the indemnity agreement would be unnecessary. Respondent readily admits that the lessor should pay for its own negligence; however, to require it to pay for the lessee's negligence does violence to the regulations. This is admitted in the Amici Curiae brief, p. 9: "On the other hand, the objective of safe operation might be frustrated if the indemnification clause also required the lessor to indmenify the lessee for the lessee's negligence, but the clause in this case does not do so." Although the indemnity provision in Transamerican's lease permits the lessee to recover from the lessor only for the negligence of the lessor's agents, servants and employees, paragraph 3 of the lease provides that the driver remains the employee of the lessor and is not the "agent, servant, employee or representative" of the lessee. This as indicated is contrary to fact and to law.

The United States and the Interstate Commerce Commission appear to misunderstand the purpose of the indemnity agreements. They are not intended to place ultimate responsibility where it belongs. As indicated in the Amici Curiae brief, such a purpose would be consistent with the I.C.C. regulations and would have a beneficial effect. However, no agreement would be necessary to reach that end. The purpose of these agreements is to shift responsibility from the lessee where the law places liability for the driver's negligence to the lessor who has no liability under the common law or the regulations. As the Amici Curiae brief concedes, this would tend to have a harmful effect and on this point respondent, the United States and the Interstate Commerce Commission are in full agreement.

Respondent respectfully suggests that there is an obvious solution to the problem fully in accord with the position taken by the United States and the Interstate Commerce Commission. Indemnity agreements which have the effect of shifting liability from the negligent party to the non-negligent party should not be allowed. Thus liability arising out of the negligent acts of the driver would remain with the lessee who has control in fact and in law. Where the negligence of the lessor in furnishing defective equipment, an accident-prone driver, etc. is the proximate cause of the casualty, the lessee should be entitled to indemnity from the lessor. The law would thus control the rights of the parties. There would remain a strong incentive for both parties to exercise due care within the areas of their responsibility, with the knowledge that liability for their negligence cannot be shifted. Litigation would be reduced and the courts would be relieved of the responsibility of construing self serving lease contracts and indemnity agreements which conflict with the law and the regulations. Liability shifting agreements have no place in trip lease contracts.

CONCLUSION

For the reasons given this Court should affirm the decisions of the District Court and of the United States Court of Appeals granting Summary Judgment to Brada Miller Freight Systems, Inc.

Respectfully submitted

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